

ORIGINAL

# FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of: ) WT Docket No.: 96-41  
)  
)  
LIBERTY CABLE CO., INC., ) File Nos.:  
for Private Operational ) 70877 WNTT370  
Fixed Microwave Service ) 708778, 713296 WNTM210  
Authorization and ) 708779 WNTM385  
Modifications ) 708780 WNTT555  
) 708781, 709426, 711937 WNTM212  
New York, New York ) 709332 (New)  
) 712203 WNTW782  
) 712218 WNTY584  
) 712219 WNTY605  
) 713295 WNTX889  
) 713300 (New)  
) 717325 (New)

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Place: Washington, D.C.  
Date: January 16, 1997

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*James A. Buchanan*

## HERITAGE REPORTING CORPORATION

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Courtroom 2  
FCC Building  
2000 L Street, N.W.  
Washington, D.C.

Thursday,  
January 16, 1997

The parties met, pursuant to notice of the Judge  
at 9:33 a.m.

BEFORE: HON. RICHARD L. SIPPEL  
Administrative Law Judge

APPEARANCES:

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## FEDERAL COMMUNICATIONS COMMISSION

I N D E X

| <u>WITNESSES:</u>   | <u>DIRECT</u> | <u>CROSS</u> | <u>REDIRECT</u> | <u>RECROSS</u> | <u>VOIR<br/>DIRE</u> |
|---------------------|---------------|--------------|-----------------|----------------|----------------------|
| Michael J. Lehmkuhl |               | 1241         | 1327            |                |                      |
| Peter O. Price      | 1343          | 1409         |                 |                |                      |

E X H I B I T S

| <u>TW/CV:</u> | <u>IDENTIFIED</u> | <u>RECEIVED</u> | <u>REJECTED</u> |
|---------------|-------------------|-----------------|-----------------|
| 38            | 1249              | 1268            |                 |
| 39            | 1270              | 1281            |                 |
| 40            | 1270              | 1281            |                 |

|                |            |                |           |
|----------------|------------|----------------|-----------|
| Hearing Began: | 9:33 a.m.  | Hearing Ended: | 4:44 p.m. |
| Recess Began:  | 12:15 p.m. | Recess Ended:  | 1:17 p.m. |

P R O C E E D I N G S

9:33 a.m.

JUDGE SIPPEL: Anything of a preliminary nature this morning?

MR. WEBER: Yes, Your Honor. Just a very, very brief matter. I have a doctor's appointment today at 5:00, so if we could just be done today by 4:45 I would appreciate it. If it looks like we're not going to be, I could probably call the doctor and just reschedule.

JUDGE SIPPEL: Well, I think that we -- any reason -- anybody see any reason why we can't accommodate that?

MR. BEGLEITER: I have no reason.

JUDGE SIPPEL: I have no reason. You can be sure that you'll be to the doctor's by 5:00 today.

MR. WEBER: Thank you. I appreciate it.

JUDGE SIPPEL: Okay. Mr. Lehmkuhl is going to continue to be questioned. Would you take the stand, please?

MR. BEGLEITER: We will have Mr. Price ready, Your Honor, as soon as Mr. Lehmkuhl is excused.

JUDGE SIPPEL: Thank you. Thank you. You're still under oath, sir.

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//

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1                   Whereupon,

2                               MICHAEL J. LEHMKUHL

3       having been previously duly sworn, was recalled as a witness  
4       herein, and was examined and testified further as follows:

5                   JUDGE SIPPEL:   Mr. Holt.

6                   MR. HOLT:   Thank you, Your Honor.   I guess I'd  
7       just like to begin by noting yesterday I misspoke regarding  
8       the date that Cablevision had filed its first petition to  
9       deny against Liberty.   I believe I referred you to a date in  
10      early November.   And I don't want to -- and you agreed with  
11      the date and I don't want to mislead.   I just want to note  
12      that the date that we filed -- that Cablevision filed its  
13      first petition was September 5, 1995 if counsel would, you  
14      know, care for confirmation.

15                  MR. BEGLEITER:   I don't have it in front of me,  
16      but that sounds right.

17                  JUDGE SIPPEL:   All right.   We'll take it at face  
18      value.   Fine.

19                  MR. HOLT:   I didn't want to confuse the Witness.

20                               FURTHER CROSS EXAMINATION

21                  BY MR. HOLT:

22                  Q     Mr. Lehmkuhl, I'd like to begin by referring you  
23      to your April 28th memorandum to Mr. Nourain and Mr. Price,  
24      Exhibit 34 -- Cablevision/Time Warner.   Do you have that  
25      before you?

1 A Yes.

2 Q Okay. If you would turn to the appended list of  
3 paths. This list provides -- identifies a number of -- of  
4 paths for which applications were pending at the FCC,  
5 correct?

6 A Yes.

7 Q And included among those paths, if you look to  
8 page 2, is 2727 Palisades.

9 A Yes.

10 Q Correct? Now, there came a time, did there not,  
11 when you filed -- you on behalf of Liberty filed STA  
12 requests for a number of the paths that had pending  
13 applications?

14 A Yes, that's correct.

15 Q And if we refer to the HDO -- Appendix A of the  
16 HDO which is Exhibit 30 -- do you have that before you?

17 A Yes.

18 JUDGE SIPPEL: Do you want him to look at these  
19 side-by-side?

20 MR. HOLT: Those are foundational questions.

21 JUDGE SIPPEL: All right.

22 MR. HOLT: Thank you, Your Honor.

23 BY MR. HOLT:

24 Q Okay. If you look at the entry under, "Date STA  
25 Applied For", you see that there are a number of STAs that

1 were applied for on the 4th of May. And then if you look  
2 toward the bottom, there was an STA request that was filed  
3 for 2727 Palisades Ave. on May 19th, 1995, is that correct?

4 A Yes.

5 Q What was it, if anything, that caused you not to  
6 file an STA request for 2727 Palisades on May 4th, 1995?

7 A I don't recall.

8 Q Well, what criteria, if any, did you use to select  
9 which paths you'd apply STAs for on May 4th, 1995?

10 A I believe they were the ones that Mr. Nourain  
11 communicated to me.

12 Q Is it your testimony then that he did not  
13 communicate to you a need to file a STA request for 2727  
14 Palisades --

15 A No.

16 Q -- earlier than --

17 A No.

18 Q He may have?

19 A He may have.

20 Q You have no recollection of focusing on 2727  
21 Palisades and making a determination as to whether or not  
22 you would file an STA request on May 4th, 1995 along with  
23 the others?

24 A No, I don't recall.

25 Q Do you recall having any discussions with Mr.



1 Nourain on that subject at all?

2 A No, I don't.

3 Q Do you recall any discussions with Mr. Barr on  
4 that subject at all?

5 A No, I don't recall.

6 Q Do you know whether Mr. Barr had any discussions  
7 with Mr. Nourain on that subject?

8 A No.

9 Q Or anyone else?

10 A No.

11 Q If you refer back to your April 28th memo, again,  
12 Time Warner/Cablevision Exhibit 34, if you would turn to  
13 page 2 of the actual memo, do you have that before you?

14 A Yes.

15 Q There's a -- in the first full paragraph beginning  
16 with, "The Commission has indicated that it will not  
17 routinely grant STAs" --

18 A Yes.

19 Q -- "requests for STAs", you've listed two  
20 situations -- two exceptions to that statement, correct?

21 A Yes.

22 Q And the first exception is where the application  
23 has appeared on public notice and has been pending for more  
24 than 60 days since, correct?

25 A Yes.

1 Q What did you mean by that sentence?

2 A Exactly what it says, where the application  
3 appears on public notice and where it had been pending on  
4 public notice for more than 60 days where it has not --  
5 where it had not been granted.

6 Q Sixty -- yes, it had not been granted after  
7 appearing on public notice and it had been pending for 60  
8 days.

9 A Yes.

10 Q Now, if you look to page 2 of the attached list of  
11 pending applications, refer back again to the 2727 Palisades  
12 Avenue -- do you have that before you?

13 JUDGE SIPPEL: You're still on Exhibit 34.

14 MR. HOLT: Right.

15 THE WITNESS: Yes.

16 BY MR. HOLT:

17 Q And we see here that the public notice -- under  
18 the entry, "PN Accept", that's public notice acceptance  
19 date, right?

20 A That's correct.

21 Q The date it came out on public notice.

22 A Yes.

23 Q That was April 14, 1995, correct?

24 A That's correct.

25 Q And Liberty filed its STA request for 2727

1 Palisades on May 19, 1995, right?

2 A Yes.

3 Q Which is just more than 30 days after the  
4 appearance of public notice, right?

5 A I believe so.

6 Q So it's less than the 60 days that you had  
7 referred to in your memo as being a --

8 A Apparently so, yes.

9 Q Can you explain -- there's a second exception that  
10 you've listed here in this memo, correct?

11 A Yes.

12 Q And that essentially refers to emergency  
13 situations or where delay would seriously prejudice the --

14 A Yes, that's correct.

15 Q What, if any, emergency situation existed at the  
16 time you filed the May 1995 STA requests that --

17 MR. BEGLEITER: Objection, Your Honor. There's no  
18 foundation.

19 MR. HOLT: I asked if any. What emergency  
20 situation existed, if any --

21 JUDGE SIPPEL: Well, I'm going to sustain the  
22 objection. Rephrase the question.

23 MR. HOLT: Okay. Thank you, Your Honor.

24 MR. HOLT:

25 Q Mr. Lehmkuhl, what emergency situation, if any,

1 existed at the time you filed the May 19th, 1995 STA request  
2 for 2727 Palisades?

3 A I don't recall that there were any.

4 Q And given that public notice had been released on  
5 4/14/95, and the STA request was filed approximately 30 days  
6 after that, was it your testimony that there was some sort  
7 of delay in processing the application?

8 A Well, I don't think you read the last part of that  
9 where it says, "Where a delay would seriously prejudice the  
10 public interest."

11 Q Is it your testimony that a delay on the grant  
12 of -- or a delay in filing the STA request would prejudice  
13 the public interest?

14 A A delay in filing the STA?

15 Q I guess I --

16 A I don't understand your question.

17 Q I guess I'm interested in knowing what was it that  
18 caused you to believe that there was a situation that  
19 merited the filing of an STA request --

20 A It's -- it's --

21 Q -- for 2727 Palisades.

22 A It's included in the STA.

23 MR. HOLT: Okay. Let's take a look at the STA if  
24 we can. Your Honor, I'd like to ask that a document be  
25 marked for identification as Time Warner Exhibit -- Time

1 Warner/Cablevision Exhibit, I guess are we up to 38?

2 JUDGE SIPPEL: 38.

3 MR. BEGLEITER: Judge --

4 JUDGE SIPPEL: Does the Reporter have the  
5 document? I'm sorry. Mr. Begleiter?

6 MR. BEGLEITER: You know, I think I know where Mr.  
7 Holt is going. And I think that we could probably even  
8 stipulate to some of the things he's going to -- he's going  
9 to bring out. Now, if we want to do it outside the presence  
10 of the Witness, that's fine.

11 MR. HOLT: I'd like to conduct my examination if I  
12 may.

13 JUDGE SIPPEL: No, let him do it his way. This  
14 isn't going to take too much longer, is it?

15 MR. HOLT: I don't -- I hope not. It's following  
16 a line of questioning. I'll hand the original two to the  
17 Court Reporter, one to Your Honor --

18 JUDGE SIPPEL: Thank you.

19 MR. HOLT: -- one to the Witness, one to all  
20 counsel. Did you say we were up to Exhibit 38?

21 JUDGE SIPPEL: Yes, this will be 38 according to  
22 my count.

23 MR. HOLT: It's a four page document bearing the -  
24 - starting with a letter, a letter headed Pepper & Corazzini  
25 dated May 19th, 1995 and proceeding to a -- what appears to

1 be a fee remittance form filed on the fourth page.

2 BY MR. HOLT:

3 Q Mr. Lehmkuhl, do you have that exhibit before you?

4 A Yes.

5 Q Is that your signature that appears at the bottom  
6 right-hand corner of the document --

7 A On the first page?

8 Q Right.

9 A Yes.

10 Q If you would take a moment to review this document  
11 and tell me whether or not it appears to you to be complete.

12 A It looks that way.

13 Q I'd like you to think back to the time period you  
14 filed this --

15 JUDGE SIPPEL: Well, before you start this, I'm  
16 going to ask the Reporter to mark that for identification as  
17 TW/CV Number 38 for identification.

18 (The exhibit referred to was  
19 marked for identification as  
20 TW/CV Exhibit Number 38.)

21 Go ahead, sir.

22 MR. HOLT: Thank you, Your Honor.

23 BY MR. HOLT:

24 Q I'd like you to take a moment to review the -- the  
25 actual text of the request which appears on page 2 and 3 of

1 the document. Have you done that?

2 A Yes.

3 Q Do you recall whether you were assisted by anyone  
4 in preparing this STA request?

5 A I don't recall.

6 Q Do you recall whether it was reviewed by Mr. Barr  
7 before it was filed?

8 A I don't recall.

9 Q Well, you -- you have the May 4th -- you recall  
10 having the May 4th STA request reviewed by Mr. Barr, do you  
11 not?

12 A Yes.

13 Q And you're saying that you don't believe Mr. Barr  
14 reviewed this?

15 A No, I'm saying I don't recall.

16 Q Is it likely that he did?

17 A It's possible.

18 Q You understood that at this time, Liberty's  
19 filings before the FCC were under scrutiny by other parties,  
20 correct?

21 A Yes.

22 Q And Mr. Barr and other attorneys were reviewing  
23 filings made with the FCC by your office on this subject,  
24 correct?

25 A Yes. But I don't recall whether or not anyone

1 reviewed this.

2 Q Now, I assume -- if you turn to page 3 of the  
3 exhibit, you see it's -- a signature that appears above the  
4 name, Behrooz Nourain. Does that appear to be Mr. Nourain's  
5 signature?

6 A Yes, it does.

7 Q And you see a signature date of May 18, 1995,  
8 correct?

9 A Yes.

10 Q Did he write that date in?

11 A Yes, it appears so.

12 Q Do you recall sending this entire document to Mr.  
13 Nourain for review and his signature?

14 A I -- I really don't recall.

15 Q Would it have been your ordinary practice to send  
16 a complete copy of a two page document for review prior to -  
17 -

18 A Yes.

19 Q -- having him sign it? At this time period?

20 A Yes.

21 Q And is it likely that you did send it to him for  
22 his review prior to signing it?

23 A It's likely, yes.

24 Q Do you recall discussing the document with Mr.  
25 Nourain before he signed it?



1 A I don't recall.

2 Q If you turn to the -- the page 2 of the exhibit,  
3 the first full paragraph, there's a reference to -- the last  
4 sentence begins, "Given the extraordinary circumstances  
5 regarding the need for service, any delay in the institution  
6 of temporary operation would seriously prejudice the public  
7 interest." Is that a correct reading?

8 A Where is -- where are you -- oh, on the first  
9 paragraph?

10 Q Right.

11 A And your question was again?

12 Q Okay. Is that a correct reading?

13 A Yes.

14 Q At the time that you wrote that, you understood  
15 that no petition to deny had been filed by Cablevision  
16 against this path, correct?

17 A I don't recall.

18 Q Well, if you refer back --

19 A I don't recall.

20 Q Okay. If you refer back to your April 28th  
21 memorandum, Exhibit 34 -- Time Warner/Cablevision Exhibit  
22 34, if you'll look to the appended list, page 2 of the  
23 appended list where 2727 Palisades appears, under the "PD  
24 Date" entry which we've previously established was the  
25 petition to deny date, there's no date listed, correct?

1 A That's correct.

2 Q Which leads you to believe that no petition to  
3 deny for filing --

4 A That's correct.

5 JUDGE SIPPEL: May I interrupt just a minute here?  
6 According to what I have on page 2 of your Exhibit 38 for  
7 identification, the property in question is 2600 Netherland  
8 Avenue.

9 MR. HOLT: Yes, Your Honor. That is the transmit  
10 site to which this path related. The path for which this  
11 was filed was 2727 Palisades.

12 JUDGE SIPPEL: All right. That's the path with  
13 the building -- all right. Is that -- is that -- does that  
14 appear someplace in here or is this just something that --

15 MR. HOLT: The path itself does not appear, Your  
16 Honor. It does refer to a file number which corresponds  
17 to -- if you refer to the HDO, it corresponds to the 2727  
18 Palisades filing that was made on March 24th, 1995.

19 JUDGE SIPPEL: All right. Then there is a -- so  
20 there is a cross reference system here. And I'm not hearing  
21 any objection, so I'm assuming that -- okay. Go ahead.

22 BY MR. HOLT:

23 Q My question was at the time that you filed this  
24 STA, you knew that no petition to deny had been filed  
25 against this path.

1 A Like I said, I don't recall.

2 Q Do you recall having any reason to believe that a  
3 petition to deny had been filed against the path by  
4 Cablevision?

5 A I -- I don't recall.

6 Q And here we knew that the application hadn't been  
7 pending for 60 days after it appeared on public notice,  
8 correct?

9 A Yes, that's correct.

10 Q Okay. What did you mean by the term,  
11 "extraordinary circumstances", as you wrote it here in the  
12 first paragraph?

13 A I believe I was -- if you look further through the  
14 -- the STA, I think I explain the extraordinary  
15 circumstances.

16 Q Okay. Let's take a look at that. If you -- I  
17 believe you're referring to the paragraphs that appear under  
18 the heading number 2, "Need For Special Action." Can you  
19 take a moment to review those paragraphs and then tell me  
20 what you were conveying?

21 A I was conveying the fact it had -- that it had  
22 come off public notice and that it was ripe for grant.

23 Q Okay. If you look to the middle of the second  
24 paragraph, there's a sentence that reads, "In order to  
25 compete effectively with the established cable companies,

1 Liberty must be able to convert buildings to its own cable  
2 service in rapid fashion, ordinarily within a 30 day time  
3 period, and/or otherwise be able to adapt to the needs of  
4 its customers." Is that a correct reading of that sentence?

5 A Yes.

6 Q And is it your understanding that -- that this  
7 need to convert buildings to its own cable service in a  
8 rapid fashion as described here applied -- was true during  
9 the entire period from June 1994 through July 1995?

10 A I don't understand your question.

11 Q Well, you refer here to a -- a need to -- that  
12 Liberty had a need to be able to convert buildings to its  
13 own cable services in a rapid fashion ordinarily within a 30  
14 day time period. Was it your understanding that that need  
15 existed during the period -- is that a fair statement to  
16 apply during the time period June '94 through July '95?

17 A I really can't make that statement. I -- I don't  
18 know.

19 Q Well, what about from the period January 1st, '95  
20 through the date of this STA request?

21 A January -- through the date of this request, I'm  
22 not sure.

23 Q Well, isn't it true that this statement would have  
24 been equally applicable to Liberty's operations from January  
25 1st, '95 as it would -- if you -- what I'm -- let me

1 rephrase. Isn't it true that this statement would have  
2 applied to Liberty's operations at any time during the  
3 period July -- January -- January 1st, 1995 through the date  
4 of this request? Was it any less true earlier than it was  
5 as of May 17th, 1995?

6 A In -- in hindsight looking back, no, you're  
7 probably right.

8 Q Was there -- at the time you wrote this, was there  
9 anything that caused you to believe that this was a recently  
10 developed event or a recently developed need?

11 A I -- I don't recall.

12 Q Did you draft this statement yourself or were you  
13 assisted by someone else?

14 A I believe I drafted it myself.

15 Q Did you receive input from Mr. Nourain or anyone  
16 else at Liberty?

17 A I don't recall.

18 Q This reflects your understanding of Liberty's need  
19 -- Liberty's business operations, correct --

20 A Correct.

21 Q -- that this was written?

22 A Yes.

23 Q In light of that understanding, at the time you  
24 drafted this, what did you think Liberty was doing with  
25 respect to initiating new service during the period January

1 '95 through the date of this STA?

2 A I had no idea what Liberty was doing as far as  
3 initiating service.

4 JUDGE SIPPEL: Mr. Holt, this is -- I mean, I hope  
5 you're not going to take this much further. This man is not  
6 -- this Witness is not involved in the operations of the  
7 company. He's taking the information his customer -- his  
8 client's giving him and he's disclosing it to the  
9 Commission.

10 BY MR. HOLT:

11 Q Well, Mr. Lehmkuhl, you understood that Liberty  
12 had not been filing the STA requests for new paths during  
13 this -- during the period January '95 -- January 1st, '95  
14 through the date of this STA, correct?

15 A That's correct.

16 Q And you understood that --

17 MR. BEGLEITER: Objection, Your Honor. The date  
18 of this STA being May 18th?

19 MR. HOLT: From the date January 1st, 1995 through  
20 the date of this STA.

21 MR. BEGLEITER: May 18th.

22 MR. HOLT: I'm sorry.

23 BY MR. HOLT:

24 Q Through May 4th, 1995.

25 A Yes, through May 4th.

1 Q You understood that Liberty had not been filing  
2 STA requests for new paths.

3 A Yes, that's correct.

4 Q And you understood that Liberty was not being  
5 granted licenses for new paths during the same period of  
6 time.

7 A Could you be more specific?

8 Q Was not being granted -- it hadn't been granted a  
9 license for any new path during that period of time.

10 A I'm not -- I'm not so certain about that. But --  
11 I mean, it certainly hadn't been granted licenses for which  
12 Time Warner and Cablevision had petitioned against.

13 Q And so with the knowledge that it hadn't been  
14 granted STAs and it hadn't received licenses for paths  
15 against which Time Warner had filed petitions to deny, what,  
16 if anything, did you understand Liberty had been doing with  
17 respect to growing its business during the period January  
18 1st, 1995 through the date of this STA request?

19 A Like I said before, I was not involved in the  
20 operational aspects of Liberty. I mean, I can't comment on  
21 that.

22 Q Did you believe that --

23 JUDGE SIPPEL: That's a legitimate question. I  
24 mean, it could come up that you had that kind of information  
25 even though you're not involved in the operations of it. I

1 was -- I was protecting you in a more -- on a more -- on a  
2 broader scale. You know, think about that question. It's a  
3 good question.

4 THE WITNESS: Could you restate it, please?

5 MR. HOLT: Perhaps the Witness -- I mean the  
6 Reporter can read it back.

7 (Whereupon, the Court Reporter played back the  
8 pending question.)

9 JUDGE SIPPEL: Okay. You've got the question, Mr.  
10 Lehmkuhl?

11 THE WITNESS: Yes, I think I do. I honestly did  
12 not know.

13 BY MR. HOLT:

14 Q Did you ever inquire of anyone at Liberty?

15 A No.

16 Q Did you have any suspicion that Liberty had ceased  
17 expanding its business by securing new buildings during that  
18 period of time?

19 A Like I said, I didn't know. I wasn't privy to a  
20 lot of that. I didn't know.

21 Q Did anyone during that period of time, January  
22 1st, 1995 through the date of this STA, suggest to you that  
23 Liberty was not meeting its customers' demands because it  
24 wasn't able to operate?

25 A What was the time period?



1 Q January 1st, 1995 through the date of this STA.

2 A The date of this STA?

3 Q Right.

4 A Yes, I believe in the -- in the STAs that we filed  
5 prior to this on May 4th, there was a similar justification.  
6 So, yes, that would have been communicated to me around the  
7 time of that STA.

8 Q Okay. Prior to that STA, between January 1st,  
9 1995 through May 4th, 1995.

10 A No.

11 Q So no one came to you and said we can't meet our  
12 customers' -- no one from Liberty came to you and said we  
13 can't meet our customers' demands because we're not able to  
14 activate service?

15 A No one ever said that to me like that, no.

16 Q And -- and no one ever said to you that Liberty  
17 was unable to convert buildings to its own cable service in  
18 a rapid fashion ordinarily within a 30 day time period or  
19 otherwise be able to adapt the needs of its customers prior  
20 to May 4th, 1995?

21 A Maybe a few days earlier in preparation for the --  
22 for those -- that first round of STAs.

23 MR. BEGLEITER: Your Honor, may I make an  
24 extraordinary request that if we're leaving 2727 Palisades  
25 Avenue that I ask two or three questions of Mr. Lehmkuhl so